Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j)	)	MM Docket No. 97-234
of the Communications Act	)	
-- Competitive Bidding for Commercial	)	
Broadcast and Instructional Television	)	
Fixed Service Licenses	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	
	)	
Proposals to Reform the Commission's	)	GEN Docket No. 90-264
Comparative Hearing Process to	)	
Expedite the Resolution of Cases	)	

TO: The Commission

REPLY COMMENTS OF GALAXY COMMUNICATIONS, INC.

Galaxy Communications, Inc. ("Galaxy"), by counsel, hereby replies to comments submitted in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.[1]

1. *Introduction.* In September, 1986, Galaxy filed an application for construction permit for a new FM radio station in Selbyville, Delaware -- the proceeding which spawned the D.C. Circuit's rejection of the FCC's "integration" criterion in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (*Bechtel II*). At Paragraph 21 of the *NPRM*, the Commission invites comment as to the continued viability of comparative hearings for pending applications, in

[1] 62 Fed. Reg. 65392 (Dec. 12, 1997).

light of the D.C. Circuit's ruling in *Bechtel II* that the integration preference, as it evolved in the FCC's jurisprudence, is not judicially tenable.

The Court of Appeals did *not* reject in principle the notion that *some* set of criteria for selecting among competing applicants in a hearing would pass muster; only that the FCC had failed to demonstrate empirically the validity of the criterion involving integration of station ownership with station management. Thus, at Paragraph 22 of the *NPRM*, the FCC countenances a "subset" of applications which had "progressed to either an Initial Decision by an ALJ or a decision by the former Review Board, before the court found in *Bechtel II* that the integration criterion used by the Commission was unlawful." The *NPRM* invites comment as to whether, considering "the resources these applicants have expended, as well as the delays they have encountered," auctions would be inappropriate.

Galaxy strongly supports the comments of various parties urging that auctions would be wholly inappropriate for applicants, such as the applicants for the Selbyville channel, who have spent many years and many thousands of dollars prosecuting their applications to a conclusion which has yet to arrive.

2. *The Comments of Susan M. Bechtel.* In this connection, the comments of Susan M. Bechtel are compelling. Bechtel argues that it would be "unlawful to impose an auction mechanism for the sale of the frequency at market value to citizens who have made their investment in reliance on a comparative selection mechanism." Comments of Susan M. Bechtel at 3.

Specifically, Bechtel urges that auctioning of the Selbyville FM channel at this juncture would amount to an unlawful "taking" of Bechtel's property under the Fifth Amendment, because "such action effectively confiscates the investment of Mrs. Bechtel in filing and litigating her application for more than eleven years. She must either pay money into the U.S. Treasury in order to buy the rights to the frequency at market value or else abandon her more than eleven-year investment altogether. She is deprived of the fruits of her work in bringing an end to an unlawful practice." *Id.* at 4.

In Galaxy's view, Bechtel has raised a valid constitutional claim. Under the relevant Supreme Court precedent, of course, when a government agency's new regulations adversely effect a party before the Government, that loss, while not a taking per se, can qualify as a taking where the Government has "gone too far" -- that is, where the deprivation of property is "substantial." *See, Pennsylvania Coal Co. Mahon*, 260 U.S. 393 (1922). That "property" within the meaning of the Due Process Clause is involved here should be clear: Applicants such as Galaxy and Bechtel have a cognizable interest in the investment of time and money -- spanning some eleven years -- in reliance on the regulatory structure in effect during that period. To subject Galaxy-era applicants to auctions would impose an indefensible randomness of government action upon them -- unlawful because it could not reasonably be claimed that such applicants had any inkling, let along formal notice, that their substantial investments would be frustrated by auction legislation passed more than a decade later.

3. *The Comments of Lisa M. Harris and Breeze Broadcasting Co.* Galaxy also

concurs with the arguments of Lisa M. Harris and Breeze Broadcasting Co. that, under *Bechtel II*, the Commission should use modified criteria for evaluating competing applications in the pre-1994 class. Such was also the essence of the comments Galaxy filed in response to the Commission's rulemaking notice after the *Bechtel* remand. The Commission can adopt a comparative standard that incorporates such features as comparative coverage, broadcast experience, local residence, and civic involvement as appropriate preferences for differentiating among competing applicants. *See also* Comments of Susan M. Bechtel at 8 - 10. In the event that comparison results in a determination that the differences between the best qualified applicants are minimal, the Commission should consider that a "tie" exists among two or more qualified applicants. In those circumstances, the winner as among the tied applicants should be decided by lottery.

4. *The Untimely Comments of Francis L. Smith Should be Disregarded.* Francis L. Smith, a principal in Anchor Broadcasting Limited Partnership ("Anchor"), filed late comments that need not be considered by the FCC. In any event, however, Smith's argument that Anchor "should not be grouped . . . with those who have not been awarded a construction permit" is wholly unavailing. Comments of Francis L. Smith at 3. Smith appears to suggest that, because Anchor assumed the risk of operating the Selbyville station pursuant to a construction permit grant that had not become final, Anchor has acquired some sort of protection against the ultimate loss of the permit, depending on the outcome of the *Bechtel II* remand and the *NPRM*. That is incorrect. *See, e.g., Auction of IVDS Licenses*, 6

CR 134 (Wireless. Bur. 1997) (licenses awarded at re-auction would be, as a matter of law, subject to the outcome of court cases); *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 735-36 (D.C. Cir. 1976) (grant of licenses are subject to judicial review and obligation of FCC to give effect to court's judgment).

5. *Conclusion.* For these reasons, Galaxy urges the FCC to apply a modified version of its current selection criteria to the subset of applicants as to which hearings had been held prior to the second *Bechtel* remand.

Respectfully submitted,

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